United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

74-2299

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-2299

REID L. FELDMAN, ADM'R.,

Plaintiff-Appellee-Cross Appellant,

v.

ALLEGHENY AIRLINES, INC.,

Defendant-Appellant.

PETITION OF PLAINTIFF, REID L. FELDMAN, ADM'R., FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Plaintiff, by his undersigned attorney, submits this petition for rehearing and suggestion of rehearing en banc. Rehearing is sought with respect to those parts of the Court's decision which: (1) set aside as too low, the District Court's findings with respect to

decedent's prospective living expenses (Slip Op., pp. 6267-69) and (2) set aside that part of the District Court's findings on decedent's loss of earning capacity which dealt with decedent's child-rearing years (Id, pp. 6265-67).

ARGUMENT

I.

In holding that the living expenses projected for the decedent by the lower court were too low, this Court has improperly assumed the fact-finding role assigned to the District Court by Rule 52(a) of the Federal Rules of Civil Procedure. In so ruling, this Court's decision is in conflict with the controlling decisions of the Supreme Court and of this Circuit with respect to Rule 52(a), see, e.g., United States v. Yellow Cab Co., 338 U.S. 338, 341-342 (1949); United States v. 105.22 Acres of Land, 498 F.2d 8, 9 (2d Cir. 1974), and the instant petition for rehearing should accordingly be granted. See also Snyder v. United States, 350 U.S. 906 (1955).

In its action on living expenses, the Court acted sua sponte. The point was not raised by Allegheny in its motion for a new trial, in any of its two briefs in this Court or in any of its pre-brief filings with the Court. It was not listed as an issue in Allegheny's main brief's "Statement of Issues" and it was not dealt with or even mentioned elsewhere in that brief or in Allegheny's Reply Brief. Accordingly, plaintiff had neither notice nor opportunity to brief this aspect of the Court's decision.

Furthermore, the Court concedes that it was ". . . dealing de novo with factual matters . . ." (Slip Op., p. 6269). We recognize that this may be tantamount to a holding that the lower court's living expense findings were "clearly erroneous" as required by Rule 52(a), even though the decision never mentions that Rule. Nevertheless, there is no indication as to the basis for such a holding other than the Court's own generalized statement asserting judicial notice about the " . . . facts of life, including the cost of living for those in the positions of the Feldmans in such metropolitan areas as Washington, D.C." (Ibid, p. 6269). Yet the Court does not identify the facts that merited such judicial notice and which persuaded the Court that the District Court's figures were too low. With deference, therefore, we contend that this approach constitutes an arrogation by an Appellate Court of fact-finding responsibilities vested in the District Court by Rule 52(a). Zenith Corp. v. Hazeltine, 395 U.S. 100, 123 (1969).

The proceedings before the District Court contained evidence on living expenses from both plaintiff and defendant. The decedent's living expenses were set forth in detail by her husband, the plaintiff. The court declined to accept those figures for the initial post-mortem year, but increased them by 25 percent (to $2,750 per year) to take into account the higher epxenses the court attributed to living in Washington.

This Court rejects that finding apparently because it believes that had it been sitting as a trier of fact, it would have selected a starting figure of $4,000 per year, or almost twice decedent's actual living expenses in the year before death. We put to one side the fact that this suggested virtual doubling by this Court of a decedent's actual living expenses is, unsupported by the record, and, so far as we are aware, without precedent in this Circuit. The issue which remains, however, is not what this Court would have decided were it the trial court, but rather whether the District Court exceeded its fact-finding discretion in this area. United States v. Yellow Cab Co., 338 U.S. 338, 341, 342 (1949). We submit that what the Court has done is to ignore this traditional division of responsibility and to substitute its own generalized ideas based on matters outside the evidentiary record for the careful, reasoned finding of the District Court based on record evidence. The error in this holding of the Court of Appeals is underscored by the failure of Allegheny to even list or brief the point in any of its papers or briefs with the Court.

Indeed, the seriousness of that error is made manifest by the post-trial affidavit of Allegheny's expert in support of Allegheny's motion for a new trial. Dr. Curran there stated in part:

> "As for expenditures necessary to maintain life, I find myself in general agreement with

> the results [reached by the District Court], particularly with the argument that the minimum standard of living will rise with income . . . ." (Curran Aff., p. 8).

Furthermore, in this Circuit courts have frequently made findings on living expenses far below those which this Court disapproves as too low here. (See, e.g., Petition of Marine Sulphur Transport (S.D.N.Y., Doc. No. 63 AD 237), July 31, 1974 (Slip Op.) ($1,200 per year); Petition of Marina Mercante Nicaraguense, 248 F. Supp. 15, 29 (S.D.N.Y. 1965) ($1,120 per year), aff'd 364 F.2d 118 (2d Cir. 1966). Under all these circumstances, the Court's holding on this aspect of the case is clearly erroneous and is particularly inappropriate in the light of this Circuit's decisions in upholding income tax deductions well below the stiff, across-the-board 25 percent income tax deduction imposed by the District Court here. (See, e.g., LeRoy v. Sabena Belgian Airways, 344 F.2d 266, 276 (2d. Cir. 1965) (15 percent tax rate applied).

II.

The reversal of the lower court's holding on loss of earning capacity during decedent's child-rearing years runs counter to Erie R. Co. v. Tomkins, 304 U.S. 64 (1938). The Court has, in effect, substituted its own judgment for that of the Connecticut courts on this point. Those Connecticut courts have repeatedly stressed that under Connecticut's Wrongful Death Statute, the test in loss of earnings is not

loss of actual earnings, but of "earning capacity". (See, P. Br., pp. 23-25).

Decedent retained the capacity to work full time at the time of her death. That is dispositive. There is no more reason to reduce her future earnings because she was planning to take some time off from full-time work to bear children (a plan which she was at liberty to change at any time), than there is to reduce a male decedent's future earnings because of possible future unemployment during part of his life or because he, rather than his wife, might decide to spend some time at home during his children's early years. To single out possible child-bearing as a reason for a reduction in a decedent's earning capacity is to impose an unjustifiable discrimination against female decedents which is not countenanced by Connecticut law.

There is no Connecticut decision which stands for such a proposition. The test in Connecticut is "loss of earning capacity", and a female retains that capacity just as much as does a male (P. Br., pp. 23-25). Contrary to this Court's view, Chase v. Fitzgerald, 132 Conn. 461, 45 A.2d 789 (1946), is not persuasive on the point because it involved a woman who had never worked, did not intend to work, and hence had no outside earning capacity. Even so,

the Connecticut Supreme Court recognized that some monetary award should be made to the female housewife in the " . . . condition, capacity, ability and efficiency of the deceased in the discharge of her domestic duties, not only as a laborer performing menial service, but also as the housewife and head and administrator of the internal affairs of her home . . .." Id, at 793. If such capacity is properly compensable, as Connecticut law holds, surely the decedent's continued capacity to earn is likewise compensable. The Court's holding to the contrary misconstrues Connecticut law and, in so doing, discriminates unjustifiably against female decedents.

CONCLUSION

For the reasons stated, plaintiff requests a rehearing on the two issues listed above and suggests the appropriateness of a rehearing en banc on those two issues.

Respectfully submitted,

October 9, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition of Plaintiff for Rehearing and Suggestion of Rehearing En Banc upon Defendant, Allegheny Airlines, Inc., by mailing a copy thereof by first class mail, postage prepaid to Defendant's Counsel, William R. Moller, Esq., Regnier, Moller and Taylor, 41 Lewis Street, Hartford, Connecticut.

John W. Douglas

JOHN W. DOUGLAS

October 9, 1975.